Supreme Court, U.S.
FILED
DEC 12 1983
ALEXANDER L. STEVAS
CLERK

No 83-975

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

PATMON, YOUNG AND KIRK PROFESSIONAL CORPORATION and HALLISON H. YOUNG, Individually and in his Capacity as an Officer and Responsible Employee of Patmon, Young and Kirk

Petitioners,

v.

UNITED STATES OF AMERICA and BONNIE BURKS, Revenue Agent of the Internal Revenue Service,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Patmon, Young & Kirk
Professional Corporation
Hallison H. Young
In propria persona
3770 Penobscot Building
Detroit, Michigan 48226
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QUESTIONS PRÉSENTED

WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S ORDERS FINDING PETITIONERS IN CONTEMPT OF COURT AND IMPOSING COERCIVE SANCTIONS FOR THE PETITIONERS' ALLEGED FAILURE TO PRODUCE SUBPOENAED AND COURT ORDERED PRIVATE PAPERS AND BUSINESS RECORDS OF MR. YOUNG, AS A SOLE PROPRIETOR?

WHETHER GOVERNMENT AGENTS' UNCONSTITUTIONAL SEARCH AND SEIZURE AND UNLAWFUL DISCLOSURES SHOULD BAR THE IRS FROM RECEIVING THE COURT'S AID IN ENFORCING SUMMONSES ISSUED TO ASSIST INVESTIGATIONS THAT WERE INTENSIFIED AS A RESULT OF INFORMATION UNCONSTITUTIONALLY AND UNLAWFULLY OBTAINED?

WHETHER THE COURT OF APPEALS' FAILURE TO DECIDE MR. YOUNG'S EXPEDITED APPEALS WITHIN THE TIME LIMITATION IMPOSED BY 28 U.S.C. § 1826 VIOLATED MR. YOUNG'S FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW?

PARTIES

(All Names in Caption)

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

PATMON, YOUNG AND KIRK (81-1189 81-1318, 81-1549, 81-1804, 82-1005, 82-1006, 82-1217); and HALLISON H. YOUNG (81-1549, 81-1804, 82-1005), individually and in his capacity as an officer and responsible employee of Patmon, Young and Kirk (81-1251),

Petitioners,

v.

UNITED STATES OF AMERICA and BONNIE BURKS, Revenue Agent of the Internal Revenue Service,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Patmon, Young & Kirk Professional Corporation and Hallison H. Young, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals (App. A , infra, p. 1a) is not reported. The orders of the district court (App. D - G , infra, pp. 91-27a) are not reported, except United States v. Young, 532 F.Supp. 344 (E.D. Mich. S.D. 1981).

JURISDICTION

The petition for rehearing was denied on September 15, 1983 (App. B , infra, p. 5a). An order staying mandate was filed on October 26, 1983, staying the issuance of mandate in these cases until December 25, 1983 (App. C , infra, P. 7a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1), 2101(c), and Rule 20 of the Rules of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution provides in pertinent part:

> "No person shall be *** compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.***"

STATUTORY PROVISIONS INVOLVED

26 U.S.C. § 7402(a) provides:

> The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs, and orders of injunction, and of ne exeat republica, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

26 U.S.C. § 7604(a) provides:

> Jurisdiction of district court. If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

28 U.S.C. § 1291 provides:

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1826 provides:

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of --

(1) the court proceeding, or

(2) the term of the grand jury including extensions, before which such refusal to comply with the court order occured, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

STATEMENT OF THE CASE

The cases before this Court are related to those which are the subject of a separate Petition for Certiorari, "Patmon, Young and Kirk and Frederick Patmon v. United States of America, et al., No 83-824".

It should be noted that the Supreme Court has granted certiorari in cases involving virtually identical issues and claims as those of Petitioners. See, e.g., United States v. Fox, [83-2 USTC ¶9660], at p. 88,371 n. 5. See United States v. Doe, 51 U.S.L.W. 3789 (U.S. May 2, 1983) (summarized at 51 U.S.L.W. 3424), granting cert. to In re Grand Jury Empanelled March 19, 1980, 680 F.2d 327 (3rd Cir. 1982). But see United States v

Schlansky [83-1 USTC ¶9418], No. 82-5200, slip op. 1, 7 (6th Cir. June 16, 1983), petition for cert. filed, 83(10) Stand. Fed. Tax Rpts. (CCH) p. 70,774.

These consolidated and expedited [28 U.S.C. § 1826(b)] cases involve appeals of orders and judgments and post-judgment orders issued in Civil Action Nos. 80-74868, 80-74869 and 80-74872 by the District Court of the Eastern District of Michigan, which enforced IRS summonses, and imposed sanctions for civil contempt against Hallison Young ("Mr. Young") individually, Hallison Young, as a responsible employee and officer of Patmon, Young & Kirk Professional Corporation ("PYK") and PYK, respectively.

These cases arose out of an IRS investigation into the tax liabilities of Mr. Young, a sole proprietor, for the calendar years 1976 and 1977. The IRS issued two identical summonses to Hallison H. Young, individually, and as a responsible officer of Patmon, Young & Kirk Professional Corporation and a third summons to PYK, ordering Mr. Young to testify and to produce certain of his private records and certain records of PYK. The IRS petitioned the district court for judicial enforcement of the summonses and on February 16, 1981, Mr. Young and PYK filed their responses, affirmative defenses and motion to dismiss, and Mr. Young, individually, asserted, inter alia, that the enforcement of the summonses violated his fourth and fifth amendment rights and that the bulk of the documents summoned were never in existence and to the extent that

any such documents ever existed, the bulk thereof, at the time the summonses were allegedly served, were not within their possession, custody or control and that their whereabouts were unknown. (Jt. App. 114, 124, 125, 127, 130, 131, 138, 151, 152, 153, 155, 178, 182.)[1/]

During the hearing before the district court on March 6, 1981, Mr. Young gave testimony substantiating his and PYK's defense that the bulk of the documents sought by the summonses were non-existent. (Jt. App. 974 - 975, 984, 1000 - 1002.)

During Petitioner Burks' cross-examined testimony on February 18, 1981, she testified under oath that, with reference to Government Exhibit No. 2 (the summons served on Mr. Young as a responsible officer of PYK in Civil Action No.

1/ "Jt. App." refers to Appellants' Joint Appendix in the related cases filed in the U.S. Court of Appeals for the Sixth Circuit.

80-74869), she made a mistake in drafting the rider and that "there should have been a separation between the two ['expenses' and . . . 'income']". (Emphasis added.) (Jt. App. 870.)

On March 6, 1981, during Agent Burks' testimony in the summons enforcement proceedings, the government withdrew from its petition in the summons addressed to PYK in Civil Action No. 80-74872 the request for production of all but the W-2 and 1099 forms. (Jt. App. 887.)

Petitioner Burks, on March 6, 1981, also testified, in response to a question put by Mr. Young's attorney concerning what documents were sought by the summonses, that:

> "Having not looked at the taxpayer's records and having not known exactly what records the taxpayer had in his possession then it would have been kind of hard. I would have had to use a lot of imagination in order to

> request specific records because every taxpayer's records are different. Therefore, I would have to use a general statement in order to request records from the taxpayer." (Jt. App. 891.)

On the same day, in response to a question put by Mr. Young's counsel concerning Agent Burks' intention in serving the summons addressed to Mr. Young in his capacity as a responsible employee of PYK, requiring him to produce documents that might be within the possession of PYK, she stated that:

> "Well, it was an oversight and I am sorry, I didn't understand--" (Jt. App. 925.)

During Mr. Young's direct examination on March 6, 1981, he testified that there were certain documents or items requested in the summonses addressed to him individually and as a responsible employee of PYK that were <u>not in existence</u> (e.g., statements of W-2 income, money orders, certified checks, physical master recordings)

and not within his possession. (Emphasis added.) (Jt. App. 984, 999, 1000, 1001.)

In the district court's opinion and order enforcing the summonses issued April 30, 1981, the court stated that:

* * *

> "The Government has withdrawn from its petition the production of all but the W-2 and 1099 forms, stating that the others can be retrieved by the Government without excessive cost."

* * *

> "Respondent contends that in Civil Action 80-74869 the summons seeks records maintained by Respondent personally but is directed toward Respondent as an officer of Patmon, Young & Kirk, Professional Corporation. **He asserts that the attempt at production by means of a corporate officer violates his individual rights under the fourth, fifth, and sixth amendments.**

The Government has acknowledged clerical error in the summons directed to Respondent as a corporate officer and has withdrawn all but Paragraphs 6 and 9 of the rider to the summons. The remainder of the rider relates to business records which may properly be compelled under a fifth amendment claim even if they incriminate the custodian. See Fisher v. United States, 425 U.S. 391, 411-12 (1976), and cases cited therein." (Jt. App. 291.)

* * *

"Respondent further asserts the invalidity of the summonses because they seek materials that are not in existence or not in Respondent's custody." (Emphasis added.) (Jt. App. 293.)

In the District Court's opinion and order vacating order of April 22, 1981, "Respondents, Hallison Young, Hallison Young in his capacity as officer and responsible employee of Patmon, Young and Kirk, P.C., and Patmon, Young, and Kirk, P.C., [to] appear before Revenue Agent Bonnie Burks or her designated representative at 10 o'clock a.m. on Thursday, May 14, 1981". (Emphasis added.) (Jt. App. 63 - 67.)

After the Government withdrew part of its petition regarding the summons addressed to Mr. Young as a responsible officer of PYK in Civil Action No. 80-74869, paragraphs 6 and 9 of the rider to the summons were extant and compelled him to produce:

> "for examination the following books, records, papers and other data: (The documents described in the attached rider)"
>
> * * *
>
> "all documents required to substantiate the following expenses claimed on your 1976 and 1977 federal income tax return"
>
> * * *
>
> "Such documents should include, but are not limited to, the following:"
>
> * * *
>
> "6) **Forms 1099, W-2's, K-1's, issued to Hallison H. Young, for years ending December 31, 1976 and December 31, 1977. Also provide other records which would show dollar value and source of interest income earned, dividends earned, salary and/or wages**

> earned, professional fees, director fees, taxable income from partnerships, Sub-Chapter S Corporations, or income from whatever source whether paid or credited and whether in United States currency or fair market value of service."
>
> * * *
>
> "9) Please provide copies of all records pertaining to all obligations owed to Hallison H. Young by Patmon, Young and Kirk, P.C. Such books and records should include but not be limited to all notes, contracts, or instruments of indebtedness executed by Patmon, Young and Kirk, P.C. regarding all debts owed to Hallison H. Young." (Jt. App. 32 - 34, 45 - 48.)(Emphasis added)

On June 29, 1981, in Mr. Young's and PYK's Response to Petitioner's Motion for an Order to Show Cause why they should not be held in contempt and their Motion to Dismiss (Jt. App. 331, 340, 342), Mr. Young and PYK asserted the defenses of the government's waiver, the district court's modification of the IRS summons, substantial compliance, good faith, and past and present inability to produce any summoned

and ordered documents, except for those produced on May 14 and 29, 1981. (Jt. App. 331 - 346.)

During the contempt proceedings on June 30, 1981, Petitioner Burks gave cross-examined testimony that Petitioners did not have any evidence to show the existence of the contested documents or to show that the contested documents were then still within the possession, custody or control of Mr. Young or PYK. (Jt. App. 1036 - 1038, 1048 - 1051, 1057 - 1059, 1064 - 1065.)

Agent Burks gave further cross-examined testimony on June 30 and July 2, 1981 (Jt. App. 1036 - 1038) that she had no factual basis to believe or conclude that Mr. Young or PYK had the originals or copies of the contested documents in their possession, custody or control or that "such records are in existence", except for information obtained from the Bank of the Commonwealth. (Jt. App. 1036 - 1038, 1049 - 1050, 1055, 1064.)

As a sanction against Mr. Young, on August 24, 1981, the district court ordered Mr. Young "to purge himself by giving testimony and producing documents or account for their whereabouts, sufficient to comply substantially with the summonses issued to him as an individual and in his representative capacity." (Jt. App. 89.)

As a sanction against PYK, on August 24, 1981, the district court ordered a **"responsible officer of PYK appear to give testimony on behalf of the law firm within forty-eight (48) hours. . ., failing which the firm shall pay. . .($500) per day. . . until such testimony is given. . ."** (Emphasis added) (Jt. App. 93.)

Mr. Young appeared individually and in his representative capacity on August 25 and December 3, 1981 and gave full and complete testimony as exemplified by the following colloquy between Ms. Humphrey and Mr. Werder on August 25, 1981:

> "MS. HUMPHREY: Just to be clear, then, as far as the Government is concerned for the purposes of this present examination, you have concluded your examination of Mr. Young as an individual, and Mr. Young in his representative capacity as an officer of PYK with respect to the summonses in '4868 and '4869 for the years '76 and '77?
>
> MR. WERDER: Yes. . ." (Emphasis added) (Jt. App. 1335.)

On September 14, 1981, the district court entered an order in case No. 80-74868 (not opposed by the government) that "Respondent Hallison Young as an individual has purged himself of the finding of contempt." (Jt. App. 608.)

On November 30, 1981, the district court issued a Memorandum Opinion and Order Imposing Sanctions for Contempt (Jt. App. 689) which reads, in part, that:

> "[t]he two issues presently before the court are (1) whether the contempt of Mr. Young in his representative capacity of the company has been purged and (2) whether the contempt of the firm has been purged."

* * *

"Respondents have not complied substantially with the summonses and have failed to purge themselves of the contempt order of this Court. United States v. Rylander, 656 F.2d 1313 (9th Cir. 1981).

Accordingly, IT IS HEREBY ORDERED that Respondent Hallison Young, responsible officer of Patmon, Young & Kirk, submit himself to the custody of the United States Marshal unless he purges himself either by complying with the summons enforcement order or by producing categorical and detailed evidence regarding his inability to comply with the order of this Court.

IT IS FURTHER ORDERED that Respondent Patmon, Young & Kirk, P.C., shall pay within seventy-two (72) hours to the Clerk of the Court, for the use and benefit of the United States Government, the sum of Five Hundred Dollars ($500) per day for each day from the expiration of the 48-hour purge period afforded the law firm by the contempt order of August 24, 1981, to the date of completion of the purge proceedings, September 11, 1981 [for a total of sixteen (16) days, or Eight Thousand Dollars ($8,000)], and an additional sum of Five Hundred Dollars ($500) per day for each day from the date of entry of this order until they shall purge themselves in like terms." (Jt. App. 698 - 699.)

On December 3, 1981 (within the 72-hour deadline), Mr. Young appeared before Petitioners (without the presence of Judge Boyle) in his capacity as a responsible officer of PYK, together with witnesses Wainwright, Doshi and Ms. Bronson, and gave cross-examined and unrefuted testimony, answered fully and completely every question asked by the government (Jt. App. 1736 - 1741) (which demonstrated that Mr. Young and PYK produced categorical and detailed evidence regarding their inability to comply with the order of the district court [i.e., after further diligent searches of PYK's and Riverside Storage's premises, the contested missing documents could not be found or their whereabouts determined]). (Jt. App. 678, 1636, 1672, 1704, 1729, 1743.)

The district court, on December 7, 1981, issued an order regarding contempt purge proceedings, which reads, in part, that:

* * *

> "IT IS HEREBY FURTHER ORDERED that payment of the $8,000.00 amount assessed against the corporate respondent and the incarceration of Respondent Young be stayed until Wednesday, December 9, 1981, at 4:00 p.m." (Jt. App. 728.)

During argument on Mr. Young's and PYK's Motion to Stay, the district court on December 9, 1981, admitted that Mr. Young's appeals are meritorious when Judge Boyle stated that:

> **"While it may be true that much of what has been determined here rests on factual conclusions and credibility determinations -- and it certainly does -- it certainly cannot be clearly foretold how any Court of Appeals is going to deal with the contempt questions <u>because the area is one of great confusion</u> and the fact that the decisions of this Court rests**

> **primarily on the factual matters does not answer the question either which is wholly a question as to the quantum of proof necessary for the Respondent to make its prima fascie (sic) case or the quantum of evidence necessary to purge. I think there are issues here regarding the appropriate legal standards to be applied in contempt proceedings. Therefore, I cannot conclude that the appeal would be frivolous or taken for the purpose of delay." (Emphasis supplied.) (Jt. App. 1786 - 1787.)**

The district court orders and judgments of March 13, April 22 and May 5, 1981, enforcing the Internal Revenue Service (IRS) summonses and orders of August 24, November 30 and December 7, 1981, finding PYK and Mr. Young in civil contempt and imposing sanctions were timely appealed to the United States Court of Appeals for the Sixth Circuit and docketed as Case Nos. 81-1189, 81-1190, 81-1251 and 81-1318. (Jt. App. 97, 99, 101, 103, 105, 107.)

Mr. Leonard Green, Chief Deputy Clerk of the Sixth Circuit Court, sent a letter to counsel of record dated May 4, 1983 in case Nos. 81-1804, 82-1005, 82-1006 and 82-1217 informing Appellants that the panel of judges which heard argument in these cases in 1982 directed counsel to file supplemental briefs no later than June 6, 1983 "addressed to the effect of those cases of the United States Supreme Court's April 19, 1983 decision in the case of United States, et al. vs. Rylander, et al., 51 U.S.L.W. 4367." (App. 192.)

By letter dated May 25, 1983, Leonard Green, Chief Deputy Clerk of the Sixth Circuit, wrote a letter to counsel of record which stated, in pertinent part, that:

> "We have recently received notices of appeal from two more district court rulings in district court case No. 80-74872, United States of America, et al. vs. Patmon, Young and Kirk, et al. Those appeals, filed by Patmon, Young and Kirk and Frederick A. Patmon, have been docketed in this court as Nos. 83-1337 and 83-1338, respectively.

* * *

> I have been asked by the court to advise you that all of these cases will be heard in Cincinnati on June 21, 1983. . . :
>
> Cases Nos. 83-1337 and 83-1338, and any other new appeals which might be filed from recent district court or magistrate actions in these matters, will be argued on the basis of either the supplemental brief referred to above or an additional short brief, and any appendix necessary for the court's consideration." (App. G, J, K, infra, .)

On the basis of United States v. Schlansky, No. 82-5200 (June 16, 1983) and United States v. Rylander, _____ U.S. 51 U.S.L.W. 4367 (April 19, 1983), the hearing panel summarily affirmed the order enforcing the summonses, order finding contempt and imposing sanctions, order denying motion to find contempt purges and imposing sanctions and orders denying various motions, enforcing previous orders (appeal Nos. 81-1189, 81-1251, 81-1318, 81-1804, 82-1005, 82-1006 and 82-1217), except it dismissed the order enforcing the

summonses in Case No. 81-1190 (i.e., United States of America and Bonnie Burks, Revenue Agent of the Internal Revenue Service, Plaintiffs-Appellees, v. Hallison H. Young, Defendant-Appellant. Dist. Ct. No. 80-74868). (App. A ,infra, 1a-4a.) The Court's opinion is stated in conclusory terms, grossly misstates the facts, overlooks the substantial and first impression issues and erred on all questions of law.

REASONS FOR GRANTING WRIT

THE SIXTH CIRCUIT ERRED IN HOLDING THAT MR. YOUNG, A SOLE PROPRIETOR, IN A CIVIL CONTEMPT PROCEEDING, IS IN CONTEMPT FOR FAILURE TO PRODUCE HIS OWN TAX RECORDS AND PRIVATE PAPERS AND GIVE THE ORDERED TESTIMONY WHERE HE PROPERLY INVOKED HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

The decision of the Court of Appeals as to Mr. Young's right to assert his Fifth Amendment protection of his own tax or business records in his possession and his private papers is in conflict with the decisions of the Court of Appeals for the Third Circuit on the same matter in Matter of Grand Jury Empaneled March 19, 1980, 680 F.2d 327 (3rd Cir. 1982), cert. granted, 51 U.S.L.W. 3789 (U.S. May 2, 1983); the Eighth Circuit in United States v. Harrison, 654 F.2d 359, 361 (8th Cir. 1981) [81-2 USTC ¶ 9558]; the Seventh Circuit in U. S. v. Peters, _____ F.2d _____ (7th Cir. 1983) [82-2 USTC ¶ 9457]; and the Second Circuit In re Doe, 711 F.2d 1187, 1190-91 (2nd Cir.

1983) and U.S. v. Fox, ____ F.2d ____ (2nd Cir. 1983) [83-2 USTC ¶9660].

During the calendar years 1976 and 1977, Mr. Young as a sole proprietor, was engaged in a business and profession. (Jt. App. 862 - 868).

When the IRS summonses were served upon Mr. Young and during the summons enforcement and contempt proceedings, he variously imposed his Fifth Amendment privilege and asserted that it applied to business records of a sole proprietor. (E.g., Jt. App. 1043.)

It is now well settled among the circuit courts that the Fifth Amendment privilege applies to business records of a sole proprietor as well as to documents of a purely personal nature. See United States v. Harrison, 654 F.2d 359, 361 (8th Cir. 1981) [81-2 USTC ¶9558]; United States v. Doe, 628 F.2d 694, 695 (1st Cir. 1980); United States v. Porter, _____ F.2d _____

(7th Cir. 1983) [82-2 USTC ¶9457]; U.S. v. Fox, ____ F.2d ____ (2nd Cir. 1983) [83-2 USTC ¶9660]; United States v. Davis, 636 F.2d 1028 (5th Cir. 1981) [81-1 USTC ¶9193]. Compare: U.S. v. Schlansky, F.2d ___ (6th Cir. 1983) [83-1 USTC ¶9418].

On the authority of Fisher v. United States, 425 U.S. 391 (1976) [76-1 USTC ¶ 9353], the district court held that Mr. Young could be compelled to incriminate himself through the production of his business and personal records. Compare: U.S. v. Fox, supra, at p. 88,317 and U.S. v. Schlansky, supra, at pp. 87,219-221.2/ Other courts have agreed with the Porter case's rationale that Fisher's "implied authentication" test affords protection to

2/ The Sixth Circuit's purported reliance upon United States v. Schlansky, supra, is misplaced since the Government and the district court admitted that there were questions as to the existence or location of documents. (Jt.App. 1036 - 1065.)

business records generated by a sole proprietor taxpayer. See, e.g., United States v. Doe, 628 F.2d 694, 695 (1st Cir. 1980) (accountant's personal business records); In re Grand Jury Proceedings United States (Martinez), 626 F.2d 1051, 1055-56 (1st Cir. 1980) (physician's appointment logs); United States v. Greenleaf [77-1 USTC ¶ 9168] 546 F.2d 123, 125 n. 1, 126 n.7 (5th Cir. 1977) (inter alia, cancelled checks, cash receipt books); United States v. Plesons, 560 F.2d 890, 892 n. 3, 893 (8th Cir. 1977) (physician's appointment records); United States v. Beattie [76-2 USTC ¶9667], 541 F.2d 329 (2d Cir.), cert. denied, 425 U.S. 960 (1976) (taxpayer's letters to accountant); United States v. Fox [83-1 USTC ¶9196], 554 F.Supp. 422, 425 (S.D. N.Y. 1983) (all documents bearing taxpayer's own writing); In re Grand Jury Empanelled March 19, 1980, 541 F.Supp. 1, 2

- 3 (D. N.J. 1981) (inter alia, bank statements, cancelled checks, bank deposit tickets). See also Wigmore, 8 Evidence, § 2264 at 380 (McNaughton Rev. 1961). These courts have not relied on any wholesale protection for "private papers" stemming from Boyd v. United States, 116 U.S. 616 (1911), but have rather found that taxpayer -generated materials such as checks, bank deposit slips and appointment logs contain the potential for implicit authentication through production that Fisher prohibits.

Therefore, since the IRS summonses called for and the district court ordered that Mr. Young produce all books and records of his sole proprietorship (i.e., business and professional) and all bank and related records, Mr. Young was compelled to implicitly authenticate the summoned documents and in doing so provide a link in the chain of incrimination. Fisher v.

United States, supra, at 412-13; U.S. v. Fox, supra, at 88,372. The inference that should have been drawn from the broad sweeping summons is that the Government was attempting to compensate for its lack of knowledge by requiring Mr. Young to become a primary informant against himself. See U.S. v. Fox, supra, at 88,373.

The IRS had no way of knowing from the face of Mr. Young's returns whether he had records to support all of his claimed business deductions or whether he possessed records that reflected reported income. The mere fact that Mr. Young's returns reveal on their face certain information did not give the IRS any information about whether he had records of bank accounts. When asked to explain what information was being sought by the summonses, the Government agent stated:

> "Having not looked at the taxpayer's records and having not known exactly what records the taxpayer had in his possession then it would have been kind of hard. I would have had to use a lot of imagination in order to request specific records because every taxpayer's records are different. Therefore, I would have to use a general statement in order to request records from the taxpayer." (Jt. Ap. 891.)

It is precisely the sort of fishing expedition involved in the cases below that the Fifth Amendment was designed to prevent. Accordingly, the Sixth Circuit and the district court should have held that enforcement of the summonses would result in compelled testimonial communications by Mr. Young. Accord: U.S. v. Fox, supra, at 88,373; In re Grand Jury Empaneled March 19, 1980, supra; United States v. Doe, supra, U.S. v. Porter, supra.

The Sixth Circuit's reliance upon Schlansky as a basis for granting summary affirmance of the district court orders implicitly held that testimonial communica-

tions were not compelled by the enforcement of the IRS summonses calling for all of Mr. Young's records pertaining to his business, his finances, and his income tax deductions. However, as demonstrated by the massive summons enforcement, contempt and purge proceedings following the entry of the orders and judgments enforcing the IRS summonses, the Government and the district court used the very compelled testimony and proprietary documents of Mr. Young as a basis for finding him and PYK in civil contempt and imposing sanctions. In fact, the district court specifically found that Mr. Young's failure to disclose and identify his personal records evidenced his contempt. (App. F , infra, 21a-23a .)

The compulsory production of the "business records" of Mr. Young, as a sole proprietorship, was protected by the Fifth Amendment privilege against self-

incrimination. U.S. v. Fox, supra. Properly construing U.S. v. Fisher, the court below should have ruled that enforcement of the summonses would force Mr. Young to perform both types of incriminating testimonial acts identified in U.S. v. Fisher in that he would be and in fact was required to acknowledge the existence of records of which the Government was not aware and to implicitly authenticate the records as his own. Even though the Government may have had knowledge of the existence of some of Mr. Young's records, the summonses calling for "all" of his books and records should have been characterized by the court below as an attempt by the Government to make Mr. Young the primary informant against himself by requiring him to add "to the sum total of its information".

Moreover, the "implicit authentication" standard of Fisher extends the Fifth Amendment protection beyond records handwritten by a taxpayer. U.S. v. Fox, supra. As the Second Circuit did in Fox, the Sixth Circuit and the district court should have extended the protection to include any records in Mr. Young's possession the compulsory production of which would implicitly authenticate them as records pertaining to his business, his finances, or his income tax deductions. U.S. v. Fox, supra. Accord: United States v. Porter; In re Grand Jury Empaneled March 19, 1980, supra; In re Grand Jury Proceedings (Johanson), 632 F.2d 1033 (3rd Cir. 1980).

In the cases below, the compelled production of Mr. Young's own papers as a sole proprietor was clearly testimony as to their identity and genuineness. (App. D, E, infra, 9a-18a). Mr. Young's compelled

delivery of the summoned records to the IRS, in and of itself, was clearly sufficient to authenticate the records of the subsequent criminal trial against him. U.S. v. Fox, supra, at 88,374.

Therefore, both the Sixth Circuit and the district court erred in ruling that none of Mr. Young's "business records" were potentially privileged under the Fifth Amendment. U.S. v. Fisher, supra; U.S. v. Fox, supra. Accord: U.S. v. Porter, supra (cancelled checks and deposit slips are entitled to limited Fifth Amendment protection).

Both the Sixth Circuit's affirmance of the district court's orders and judgments holding the Petitioners in contempt of court and imposing sanctions by reason of Mr. Young's failure to produce summoned and ordered private papers and business records and his failure to explain why he could not

produce the documents was inimical to Mr. Young's Fifth Amendment privilege and effectively subjected him to such contempt sanctions for conduct within the protection of the Fifth Amendment. See Curcio v. United States, 354 U.S. 118, 128 (1957); cf. United States v. Rylander, _____U.S. _____ (1983) [83-1 USTC ¶9300 at p. 86,760].

Although Mr. Young, as an officer and employee of PYK, could not assert the Fifth Amendment to prevent production of records of PYK, he did retain his personal privilege against self-incrimination. Id.

THE SIXTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S ORDERS ENFORCING THE IRS SUMMONSES, IMPOSING CONTEMPT SANCTIONS AND REJECTING PETITIONERS' FOURTH AMENDMENT DEFENSE (AS A MATTER OF LAW)

As defenses to the IRS summons enforcement and contempt proceedings, petitioners asserted that the summonses were vague and overbroad and that the contempt proceedings were based upon Burks' perjured affidavits and testimony, unlawful disclosures of petitioners' tax returns and return information and evidence illegally obtained from the Bank of the Commonwealth, all in violation of their Fourth Amendment rights.3/ (Jt.App. 2, items 14 & 17) (App. I - K, infra, 30a-37a) (App. M, infra, 41a - 44a).

On June 28, 1982, petitioners submitted to the Sixth Circuit a Motion to Remand and to Take Judicial Notice,

3/ See Appendix in Sixth Circuit Court cases 82-1006 and 82-1217, at pp. 193-201, 210-211.

claiming that newly discovered evidence showed that the Government already had in its possession before and during the enforcement and contempt proceedings, copies of all of the contested bank records, which were unlawfully obtained by the Government (without issuing a summons and complying with 26 U.S.C. § 7609) from the Bank of the Commonwealth in May, June and July, 1981. (App. M, infra, 41a - 44a). Petitioners' request to take judicial notice was based upon the authorities of Landy v. Federal Deposit Insurance Corporation, 486 F.2d 139, 151 (3rd Cir. 1973) cert denied, 416 U.S. 460; Landis v. North America Co., 299 U.S. 248, 258 (1936). Petitioners also contended that the Government relied upon perjurious testimony and affidavits (that were relevant to the issues involved in the contempt proceeding) and unlawful disclosures of petitioners' tax returns,

return information and confidential information. Petitioners contend that said evidence was materially relied upon by the district court in issuing the orders enforcing the summonses, finding petitioners in civil contempt and imposing sanctions. (Jt.App. 1391). See Phillips v. Crown Cent. Petroleum Corp., 556 F.2d 702 (4th Cir. 1977), later app., 602 F.2d 616, cert denied, 62 L.Ed.2d 756.

Although repeatedly raised in these cases and the related cases, the Sixth Circuit and district court rejected petitioners' claims of unconstitutional search and seizure and unlawful disclosures of tax returns, return information and confidential information, without conducting any factual inquiry or evidentiary hearing. (Jt. App. 2, items 14 & 17) (App. infra, 41a - 44a).

Like all other governmental agencies, the IRS must obey the Constitution and

statutes. Whether the Government's enforcement objective is civil or criminal, or both, the IRS agents in these cases should not have used means that infringed the prohibitions of the Fourth Amendment against unreasonable searches and seizures of petitioners' papers and should not have violated 26 U.S.C. §§ 6103, 7213 and 18 U.S.C. § 1905. U.S. v. Beacon Federal Savings & Loan, supra, ____ F.2d ____ (2nd Cir. 1983) [83-2 USTC ¶ 9611] at p. 88,227; cf. United States v. Sapp, 371 F.Supp. 532, 536 (S.D. Fla. 1974). By granting enforcement to the summonses and imposing contempt sanctions that resulted from the unconstitutional searches and unlawful disclosures, the Sixth Circuit and the district court furthered the effects of, if not actually encouraged, unconstitutional and illegal conduct. Id. See, See v. City of Seattle, 387 U.S. 541, 544 (1967) (an agency subpoena must conform to fourth amendment requirements).

The decision of the Sixth Circuit as to petitioners' right to assert as a defense to the civil contempt proceedings their Fourth Amendment rights as to Mr. Young's personal papers and effects and their tax returns, return information and confidential information and business records is in conflict with the decision of the Court of Appeals for the Second Circuit on the same matter in U.S. v. Beacon Federal Savings & Loan, supra.

To affirm the district court's enforcement of the IRS summonses and orders imposing contempt sanctions required the Sixth Circuit to accept what appears to be the district court's unspoken premise: that the Fourth Amendment and statutory violations leading to the issuance of the summonses are irrelevant to the enforcement stage, and that a suppression hearing in any criminal proceeding that might later

result would be adequate protection against any unconstitutional and illegal action by the Government. Id. at p. 88,227.

Since both the district court and the Sixth Circuit rejected petitioners' Fourth Amendment defense to the summonses served on Mr. Young and PYK during the summons enforcement and contempt proceedings, pursuant to the rationale of U.S. v. Beacon Federal Savings & Loan, supra, this Court should grant petitioners' writ.

THE FAILURE OF THE COURT OF APPEALS TO DECIDE MR. YOUNG'S EXPEDITED APPEAL OF DECEMBER 15, 1981 WITHIN THE TIME LIMITATION IMPOSED BY 28 U.S.C. § 1826, VIOLATED MR. YOUNG'S FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW

The district court at the December 9, 1981 hearing held that Mr. Young's appeals to the Sixth Circuit pursuant to 28 U.S.C. § 1826 (which requires that appeals from contempt citations must be determined by the court of appeals within thirty (30) days of the date of the filing of the notice of appeal) were not frivolous and that:

> "[i]t certainly cannot be clearly foretold how any Court of Appeals is going to deal with the contempt questions because the area is one of great confusion and the fact that the decisions of this Court rests primarily on the factual matters does not answer the question either which is wholly a question as to the quantum of proof necessary for the Respondent to make its prima fascie (sic) case or the quantum of evidence necessary to purge. I think there are issues here regarding the appropriate legal standards to be applied in contempt proceedings. Therefore, I cannot

conclude that the appeal would be frivolous or taken for the purpose of delay."[4]/ (Jt. App. 1786).

The district court found, on December 9, 1981, that Mr. Young's said appeals present "some very fundamental and important issues that need to be addressed by the court of appeals with respect. . .to the standards as applied in this case concerning contempt, concerning the purged (sic) proceedings" and are not "frivolous".

On December 15, 1981, Mr. Young and PYK filed their notice of appeal and an amended notice of expedited appeal pursuant to 28 U.S.C. § 1826(b) from the district court's 12/14/81 order denying motion to vacate, enforcing sanctions for contempt, denying in part motion to stay, and denying

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4/ Since the district court found Mr. Young guilty of civil contempt and imposed sanctions against him as an officer of PYK, he is a "witness" within the ambit of 28 U.S.C. § 1826(a) and therefore entitled to its protections. See United States v. Mitchell, 556 F.2d 371, 384 (6th Cir. 1977).

motion to quash, and order admitting respondent Young to bail. (Jt. App. 105.) (App. H, infra, 28a.)

Mr. Young submitted to the court of appeals on December 24, 1981, his motion to stay, for supersedeas bond pending appeal made pursuant to 28 U.S.C. § 1826, for advancement of hearing, immediate consideration and emergency relief.

On December 3, 7, 9, 15, 16 24, 29, 30, 31, 1981 and January 4, 5, 6, 7, 12, 1982, Mr. Young's counsel, by telephone, in writing and in his motions for stay and expedited appeal, brought to the attention of the Sixth Circuit and the district court the pendency of his expedited appeals pursuant to 28 U.S.C. § 1826(b).

On January 13, 1982, the Sixth Circuit referred Mr. Young's motion to stay and to have an expedited appeal to a hearing panel for consideration, together with the merits of his appeals.

Over appellants' objections, the panel consolidated all twelve (12) appeals for reargument and argument which did not involve common questions of law or fact. Case Nos. 82-1006, 82-1217, 83-1337 and 83-1338 involve different taxpayers, tax years, issues of fact and law and subject matter (i.e., areas of testimony and nature of documents). As a consequence, the panel confused the taxpayers, the subject matter involved, the issues of fact and law and overlooked or misapprehended the points of fact and law discussed herein. (App. A, B, infra, 1a - 6a.)

The opinion of the court of appeals does not reflect a "thcrough consideration and an informed decision". In re January 1976 Grand Jury, supra. As a consequence,

an intelligent review by this court en banc and the Supreme Court is impossible. Cf. Group Ass'n Plans, Inc. v. Colquhorn, 466 F.2d 469 (D.C. Cir. 1972).

On May 28, 1983, during oral argument, Circuit Judge Krupansky stated that the panel would immediately grant appellants' motion to remand submitted June 28, 1982 because (in light of the Supreme Court's decision in Rylander) the district court did not make any factual determination as to appellants' defense of "present inability" and did not make a distinction between past and present inability. As a result, the panel did not permit argument by appellants' counsel of their defenses of past and present inability.

The 30-day time limitation expired in Case No. 81-1804 on January 3, 1982 and in Case No. 82-1005 on Saturday, January 16, 1982. The Sixth Circuit declined to act on

Mr. Young's appeals until August 1, 1983. Such inaction presented "serious constitutional" problems since the Sixth Circuit did not decide Mr. Young's appeals within thirty days. The 30-day period is mandatory and therefore constitutionally grounded, the inaction of this Court effectively denied Mr. Young his constitutional and statutory rights. See Matter of Berry, 521 F.2d 179, 181 (10th Cir. 1975), cert. denied 423 U.S. 928, rehearing denied 423 U.S. 1039; In re Grand Jury Proceedings, 605 F.2d 750, 752 n. 1 (5th Cir. 1979); In re January 1976 Grand Jury, 534 F.2d 719, 730 n. 11 (7th Cir. 1976).

The court of appeals violated its duty to insure through consideration of Mr. Young's appeal and make an informed decision. The 18-month delay despite Mr. Young's insistance on expeditiousness, violated his right to due process of law

and was therefore fundamentally prejudicial. See In re January 1976 Grand Jury, supra. The effect of the Sixth Circuit's inaction resulted in petitioners being subjected to post-judgment execution proceedings, a multiplicity of duplicitous, vexatious and unlawful summons proceedings (without the protection of an impartial judge and tribunal) and encouraged the Government's unlawful disclosures and unconstitutional searches and seizures, deprived Mr. Young of his right to an expedited appeal under 28 U.S.C. § 1826 to challenge the validity and propriety of the IRS summons enforcement, contempt and purge proceedings, and of his Fourth and Fifth Amendment rights. See Brown v. United States, 465 F.2d 371, 372 (9th Cir. 1972); Charleston v. United States, 444 F.2d 504 (9th Cir. 1971); In re January 1976 Grand Jury, supra.

THE SIXTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE DECIDED BY THIS COURT

There is nothing in the Sixth Circuit's opinion which indicates the facts on which it based its clearly erroneous conclusions. Thus, an intelligent review of the court of appeals' ultimate decision is impossible.

The failure of the Sixth Circuit to make specific findings of fact and conclusions of law, constitutes such a departure from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision. See United States v. Claycraft Co., 408 F.2d 366 (6th Cir. 1969); Group Ass'n Plans, Inc. v. Colquhorn, 466 F.2d 469, 471-72 (D.C. Cir. 1972).

The decision of the Sixth Circuit as to appellants' right to assert a Fifth Amendment privilege as to Mr. Young's personal papers, effects and personal business records is in conflict with the decisions of the Supreme Court on the same matter in United States v. White, 322 U.S. 694, 701 (1944); Bellis v. United States, 417 U.S. 85, 87-88 (1974). As a result, this Court should grant certiorari in this matter to resolve this conflict on these issues of importance to our system of jurisprudence.

CONCLUSION

The Sixth Circuit's decision in these cases involved important and first impression questions of federal law (i.e., the right of a sole proprietor to assert a Fifth Amendment protection as to his own tax/business records and private papers in his possession; and the right of an individual and corporation to assert their Fourth Amendment protection against unreasonable searches and seizures of their private papers and business records to an IRS administrative summons) which should be settled by this Court. U. S. v. Janis, 428 U.S. 433, 439 (1976); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 546 (1976); Parker v. Flook, 437 U.S. 584 (1978).

The questions presented are important to the administration of the federal tax laws, of which settlement by this Court would be in the public interest, since Petitioners' cases are representative of a

problem confronting many taxpayers. Detroit Edison Co. v. N.L.R.B., 440 U.S. 301 (1979).

The Sixth Circuit's decision conflicts with U. S. v. Beacon Federal Savings & Loan, supra. Also, the Sixth Circuit's decision squarely conflicts with Matter of Grand Jury Empaneled March 19, 1980, 650 F.2d 327 (3rd Cir. 1982), cert. granted, 51 U.S.L.W. 3789 (U.S. May 2, 1983; the Eight Circuit in United States v. Harrison, supra; and the Seventh Circuit in U. S. v. Peters, supra; and the Seventh Circuit in U.S. v. Fox, supra.

Disparate enforcement of the Internal Revenue laws resulting solely from a fortuity of forum or circuit can be prevented only through the resolution by this Court of the questions presented in this petition. Buffalo Forge Co. v. United Steelworkers of America, 428 U.S. 397, 404 (1976).

Since there now exists a clear and express conflict of decisions among the circuits on these important questions of federal law affecting many people in different parts of this Country, compelling reasons are evident why the questions presented here should be reviewed and definitively determined by this Court.

Accordingly, this Court should correct the erroneous affirmance of the district court's orders and judgments by granting the petition for a writ of certiorari.

This Court may wish to consolidate these cases with case Nos. 83-1337 and 83-1338.

Respectfully submitted,

Hallyson H. Young
In propria persona
-and-
PATMON, YOUNG & KIRK
PROFESSIONAL CORPORATION

Frederick A. Patmon
In propria persona
3770 Penobscot Building
Detroit, Michigan 48226
(313) 965-2675

Dated: December 9, 1983

A P P E N D I X

A P P E N D I X

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D	Memorandum Opinion and Order Denying Respondent Hallison Young's Motion to Dismiss Petition and Granting Enforcement of Summons entered April 30, 1981	9a
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J	Summons Form 2039 to Hallison H. Young, in his capacity as an officer and responsible employee of: Patmon, Young and Kirk, P.C.	33a
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L	Letter of Leonard Green of the United States Court of Appeals for the Sixth Circuit requesting supplemental briefs, dated May 25, 1983	38a
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APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Nos. 81-1189, 81-1190, 81-1251, 81-1318, 81-1549, 81-1804, 82-1005, 82-1006, 82-1217, 82-1827, 83-1337, 83-1338

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA and BONNIE BURKS, Revenue Agent of the Internal Revenue Service,

Petitioner-Appellees

ORDER
[Entered September 27, 1983]

v.

PATMON, YOUNG AND KIRK, (81-1189, 81-1318, 81-1549, 81-1804, 82-1005, 82-1006, 82-1217, 83-1337, 83-1338); PATMON AND KIRK, (82-1217, 82-1827,); HALLISON H. YOUNG, (81-1190, 81-1549, 81-1804, 82-1005), individually and in his capacity as an officer and responsible employee of Patmon, Young and Kirk, (81-1251); and FREDERICK PATMON, (82-1827, 83-1338);

Respondents-Appellants

/

Before: MARTIN, CONTIE, and KRUPANSKY, Circuit Judges.

We have before us a group of appeals growing out of an investigation by the Internal Revenue Service of Hallison Young

and his Detroit law firm.

On October 31, 1980, the IRS issued a summons to Patmon, Young and Kirk requesting documents and records for the tax years 1976 and 1977. Patmon, Young and Kirk delivered some of the requested documents but claimed that the remaining documents either never existed or were lost in a recent corporate relocation. Because the IRS was unsatisfied with this response, it petitioned the district court to enforce the summons. After hearing, the district court issued an enforcement order.

On June 17, 1981, the IRS moved the district court to hold Patmon, Young and Kirk in contempt because the corporation failed to produce all of the requested documents as ordered by the court. The district court held a second hearing at the close of which the court held the

corporation and Mr. Young in contempt. The court ordered Mr. Young incarcerated until he purged himself of the contempt. The order also fined Patmon, Young and Kirk $500.00 per day until it purged itself.

Attempting to purge himself of the contempt, Young appeared before the district court in August, 1981. The court, finding that Young and the firm had failed to purge themselves, imposed sanctions. These twelve appeals followed, none of which we now hold, on the basis of United States v. Schlansky, No. 82-5200 (June 16, 1983), and United States v. Rylander, U.S. _____, 51 U.S.L.W. 4367 (April 19, 1983), has merit.

Disposition of each appeal is as follows:

No. 81-1189	:	enforcement of summons affirmed.
No. 81-1190	:	enforcement of summons dismissed.

No. 81-1251	:	enforcement of summons affirmed.
No. 81-1318	:	order directing appearance before IRS affirmed.
No. 81-1549	:	order finding contempt and imposing sanctions affirmed.
No. 81-1804	:	order denying motion to find contempt purged and imposing sanctions affirmed.
No. 82-1005	:	order denying various motions, enforcing previous order, and authorizing an additional thirty days to purge affirmed.
No. 82-1006	:	enforcement of summons affirmed.
No. 82-1217	:	enforcement of summons affirmed.
No. 82-1827	:	the record is incomplete; jurisdiction is retained pending the parties' submission of record and briefs. Appealability of the order is questionable.
Nos. 83-1337 83-1338	:	dismissed as nonappealable.

It is so ordered

ENTERED BY ORDER OF THE COURT

/s/_____
Clerk

* This order was prepared by Judge Martin.

APPENDIX B

Nos. 81-1189/1251/1318/1549/1804
82-1005/1006/1217

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA and
BONNIE BURKS, Revenue Agent of the
Internal Revenue Service, [Filed Sept 27, 1983/John P. Hehman, Clerk]

Petitioners-Appellees

v. ORDER

PATMON, YOUNG AND KIRK, (81-1189, 81-1318, 81-1549, 81-1804, 82-1005, 82-1006, 82-1217); and HALLISON H. YOUNG, (81-1549, 81-1804, 82-1005), individually and in his capacity as an officer and responsible employee of Patmon, Young and Kirk (81-1251);

Respondents-Appellants

Before: MARTIN, CONTIE, and KRUPANSKY, Circuit Judges.

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above styled case; and

No judge in active service in this Court having moved for rehearing en banc

and the motion therefore having been referred to the panel which heard the case; and

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the Court's opinion,

Now, therefore, the motion for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/

Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 81-1189/1251/1318
1549/1804 & 82-1005/1217

[Entered Oct 26, 1983]

UNITED STATES OF AMERICA ET AL.,	:	
Petitioners-Appellees	:	
vs	:	ORDER
PATMON, YOUNG AND KIRK,	:	
Respondents-Appellees.	:	

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for 60 days from this date; provided that, if within such 60 days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record

and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with with-in such 60 days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT
JOHN P HEHMAN, CLERK

/s/

APPENDIX D

[Entered April 30, 1981]

UNITED STATES OF DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, et al.,

Petitioners,

vs. Civil Action No. 80-74868
Honorable Patricia J. Boyle

HALLISON H. YOUNG,

Respondent;

and

UNITED STATES OF AMERICA, et al.,

Petitioners,

vs. Civil Action No. 80-74869
Honorable Patricia J. Boyle

HALLISON H. YOUNG,

Respondent;

and

UNITED STATES OF AMERICA, et al.,

Petitioners,

vs. Civil Action No. 80-74870
Honorable Patricia J. Boyle

FIRST INDEPENDENCE NATIONAL BANK OF DETROIT,

Respondent;

and

APPENDIX D

[Entered April 30, 1983]

UNITED STATES OF AMERICA, et al.,

Petitioners,

vs. Civil Action No. 80-74871
Honorable Patricia J. Boyle

BANK OF THE COMMONWEALTH,

Respondent;

and

UNITED STATES OF AMERICA, et al.,

Petitioners,

vs. Civil Action No. 80-74872
Honorable Patricia J. Boyle

PATMON, YOUNG AND KIRK, P.C.

Respondent.

_____/

MEMORANDUM OPINION AND ORDER DENYING RESPONDENT HALLISON YOUNG'S MOTION TO DISMISS PETITION AND GRANTING ENFORCEMENT OF SUMMONS

Respondent Hallison Young has brought this Motion to Quash an Internal Revenue Service (hereinafter Service or IRS) Summons and to Strike and Dismiss the Petition for Enforcement (hereinafter Respondent's Motion to Dismiss) filed by

the Government in connection with a tax investigation of Respondent's civil tax liability. (Although there are five related actions here, each with a different respondent, the term "Respondent" as used in this ruling will refer to the respondent in the first-numbered action, Hallison Young.)

* * *

(4) Personal Records Sought From a Corporate Officer

Respondent contends that in Civil Action 80-74869 the summons seeks records maintained by Respondent personally but is directed toward Respondent as an officer of Patmon, Young & Kirk, Professional Corporation. He asserts that the attempt at production by means of a corporate officer violates his individual rights under his fourth, fifth, and sixth amendments.

The Government has acknowledged clerical error in the summons directed to Respondent as a corporate officer and has withdrawn all but Paragraphs 6 and 9 of the rider to the summons. The remainder of the rider relates to business records which may properly be compelled over a fifth amendment claim even if they incriminate the custodian. See Fisher v. United States, 425 U.S. 391, 411-12 (1976), and cases cited therein.

(5) Summons Irregular on its Face

Respondent contends that the summonses in these proceedings bear certain inconsistencies and omissions that render them invalid and unenforceable. He asserts that the summons requires him to produce "all documents" required to substantiate various entries on his income tax returns and that it is impossible to produce "all" of anything. He further asserts that the

preamble to the rider of the summonses seeks information about "the following expenses" but identifies income items as well as expense items. The mutual exclusivity of those items, Respondent argues, renders the rider unintelligible and therefore invalid.

* * *

B. Reasonableness of the Summons

Respondent contends that the summons itself, apart from any improper motive of the agent, was unreasonable and not issued in order to determine Respondent's tax liability but for some other purpose.

The testimony of Agent Burks establishes that the records sought in these proceedings are the records normally sought in connection with an audit of tax returns like those filed by Respondent. The records sought by the Government are necessary in some cases to substantiate the

amounts noted on Respondent's forms and, in other cases, are required in order to determine what amounts should properly be listed, where Respondent's return shows merely an estimate or concedely incomplete figures.

As for Respondent's claim, in relation to the reasonableness of the summons, that the items sought cannot be identified due to inconsistencies within the summons and rider, the court notes its ruling, explained above, that the language of the summons and rider are sufficiently clear to afford Respondent the proper notice of what material is sought.

Accordingly, for the reasons stated above, the Motion to Dismiss is DENIED.

The Petitions for Enforcement of the summonses issued in the above-numbered actions will be GRANTED and the summonses will be enforced.

IT IS SO ORDERED

Date: APR 30, 1981
Detroit, Michigan

/s/
PATRICIA J. BOYLE
United States District Judge

APPENDIX E

[Entered May 5, 1981]

UNITED STATES OF DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, et al.,

Petitioners,

vs. Civil Action No. 80-74868
Honorable Patricia J. Boyle

HALLISON H. YOUNG,

Respondent;

and

UNITED STATES OF AMERICA, et al.,

Petitioners,

vs. Civil Action No. 80-74869
Honorable Patricia J. Boyle

HALLISON H. YOUNG,

Respondent;

and

UNITED STATES OF AMERICA, et al.,

Petitioners,

vs. Civil Action No. 80-74870
Honorable Patricia J. Boyle

FIRST INDEPENDENCE NATIONAL BANK OF DETROIT,

Respondent;

and

OPINION AND ORDER VACATING ORDER OF APRIL 22, 1981, AND GRANTING STAY OF FIVE (5) DAYS

The Respondents in Civil Actions 80-74868 and 80-74869 and the Intervenor in Action 80-74872 have moved for a stay of Judgment pending appeal.

* * *

IT IS HEREBY FURTHER ORDERED that Respondents, Hallison Young, Hallison Young in his capacity as officer and responsible employee of Patmon, Young and Kirk, P.C., and Patmon, Young and Kirk, P.C., appear before Revenue Agent Burks, or her designated representative at 10:00 a.m. on Thursday, May 14, 1981, at Room 2286, McNamara Building, 477 Michigan Avenue, Detroit, Michigan, then and there to be sworn, to give testimony, and to produce for examination and copying the books

and records demanded by the summonses served upon them on October 31, 1980, the examination to continue from day to day until completed.

Date: May 05, 1981
Detroit, Michigan

/s/
PATRICIA J. BOYLE
United States District Judge

APPENDIX F

[Entered August 24, 1981]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, et al.,

Petitioners,

vs. Civil Action No. 80-74868
Honorable Patricia J. Boyle

HALLISON YOUNG,

Respondent;

and

UNITED STATES OF AMERICA, et al.,

Petitioners,

vs. Civil Action No. 80-74869
Honorable Patricia J. Boyle

HALLISON H. YOUNG,

Respondent;

and

UNITED STATES OF AMERICA, et al.,

Petitioners,

vs. Civil Action No. 80-74872
Honorable Patricia J. Boyle

PATMON, YOUNG AND KIRK, P.C.

Respondent.

_____/

OPINION AND ORDER HOLDING RESPONDENTS IN CIVIL CONTEMPT OF COURT

The Government, Petitioner in these related actions, has sought an adjudication of civil contempt against the Respondents in these tax summons enforcement proceedings. Because the history of the cases bears on the disposition of the Orders to Show Cause, which are the subjects of this Opinion and Order, a brief synopsis of the past proceedings is appropriate.

In December, 1980, the Government filed several related actions seeking enforcement of administrative summonses issued to Respondent Hallison Young as an individual, to Mr. Young as a responsible officer of Patmon, Young & Kirk, P.C. ("PYK"), of which he is partner, and to the law firm itself.

* * *

Sanction. Mr. Young's conflicting statements, both in the interview with Agent Burks and on the stand during these contempt proceedings, together with the false statement concerning his bank account and the lack of satisfactory explanation of salary arrangements, computation and payment of interest and principal on loans to the firm, and the continuing failure to produce records or to account for their whereabouts.

* * *

Accordingly, IT IS HEREBY ORDERED That Respondent Hallison Young be committed to the custody of the United States Marshal until such time as he is willing to purge himself by giving testimony and producing documents or accounting for their whereabouts, sufficient to comply substantially with the summonses issued to him as an individual and in his representative capacity. An order shall be

entered forthwith directing the United States Marshal to take Mr. Young into custody until he shall purge himself of contempt.

II.

In addition to the summonses issued to Hallison Young in his individual capacity and as a responsible officer of PYK, a summons was enforced by order of this Court against the law firm itself. That summons, like the one directed at Mr. Young individually, required the firm "to appear . . . to give testimony."

* * *

Without resolving the question of whether such a representation may actually have been made by counsel for the Government of whether it may have been made during the conference call with the Court's staff, I note that such a "waiver" by

counsel could not alter the Court's outstanding order enforcing the summonses, modified as they were by the Government's statement during enforcement hearings that it would not pursue certain areas.

* * *

Accordingly, I HEREBY FIND Respondent PYK in civil contempt of court for having failed to appear and give testimony as required by the summons.

* * *

IT IS SO ORDERED.

Date: AUG 24, 1981
Detroit, Michigan

/s/
PATRICIA J. BOYLE
United States District Judge

APPENDIX G

[Entered December 14, 1981]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, et al.,

Petitioners,

vs. Civil Action No. 80-74869
Honorable Patricia J. Boyle

HALLISON YOUNG,

Respondents.

and

UNITED STATES OF AMERICA, et al.,

Petitioners,

vs. Civil Action No. 80-74872
Honorable Patricia J. Boyle

PATMON, YOUNG & KIRK, P.C.

Respondent.

ORDER DENYING MOTION TO VACATE, ENFORCING SANCTIONS FOR CONTEMPT, DENYING IN PART AND GRANTING IN PART MOTION TO STAY, AND DENYING MOTION TO QUASH

Several motions having been filed by Respondents since the issuance of this Court's order of November 30, 1981, imposing sanctions for contempt and the Court having reviewed the briefs of counsel

and having ruled on these motions from the bench on December 9, 1981.

IT IS HEREBY ORDERED that for the reasons stated on the record Respondent's Motion to Vacate is DENIED. Having reviewed the authorities cited by counsel, this Court finds that its order imposing coercive, rather than compensatory, sanctions is proper and that no hearing is required for a factual determination of either the corporate respondent's ability to pay the amount assessed or the cost to the Government of these proceedings.

The Court having entered an order on November 30, 1981, finding that Respondents had failed to comply substantially with the summons and imposing sanctions until the finding of contempt shall have been purged and Respondents having presented witnesses during purge proceedings and the Court having reviewed the transcript of that

testimony and having determined that it does not amount to categorical and detailed evidence of the inability to comply with the summonses, see United States v. Rylander, 656 F.2d 1313, 1318-19 (9th Cir. 1981).

IT IS HEREBY ORDERED that Respondents have not purged themselves of the finding of civil contempt and that the sanctions imposed in the November 30, 1981, order be enforced.

IT IS HEREBY ORDERED that Respondents' Motion to Stay is DENIED as to Respondent Patmon, Young & Kirk, P.C., and GRANTED as to Respondent Wallison Young for a period of thirty (30) days. He shall be admitted to bail for that period, on his personal recognizance, at the expiration of which time he shall submit himself to the custody of the United States Marshal in accordance with the order of November 30, 1981.

The motion for stay having been denied as to the corporate Respondent, the Respondents' motion for supersedeas bond is MOOT.

IT IS HEREBY ORDERED that the Motion to Quash be treated as a motion for reconsideration and that no oral argument be had. The Court having reviewed the motion and brief, it is DENIED.

IT IS SO ORDERED.

Date: DEC 14, 1981
Detroit, Michigan

/s/
PATRICIA J. BOYLE
United States District Judge

APPENDIX H

[Filed December 15, 1981]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, et al.,

Petitioners,

vs. Civil Action No. 80-74869
Honorable Patricia J. Boyle

HALLISON YOUNG,

Respondent.

and

UNITED STATES OF AMERICA, et al.,

Petitioners,

vs. Civil Action No. 80-74872
Honorable Patricia J. Boyle

PATMON, YOUNG & KIRK, P.C.

Respondent.

AMENDED NOTICE OF EXPEDITED APPEAL

Notice is hereby given that Respondents herein, pursuant to USC § 1826(b), hereby appeal to the United States Court of Appeals for the Sixth Circuit from the Order Denying Motion to Vacate,

Enforcing Sanctions for Contempt, Denying in part and Granting in Part Motion to Stay, and Denying Motion to Quash entered December 14, 1981, a copy of which is attached hereto.

KIRK AND ROBERTSON, P.C.

BY: /s/
STANLEY R. KIRK (P 16007)
Attorneys for Hallison Young
100 Renaissance Center
Suite 2404
Detroit, Michigan 48243
(313) 259-3770

PATMON AND YOUNG
PROFESSIONAL CORPORATION

BY /s/
FREDERICK A. PATMON (P18695)

and

BY: /s/
ULYSSES W. BOYKIN III (P11082)
Attorneys for Patmon, Young & Kirk, P.C.
3770 Penobscot Building
Detroit, Michigan 48226
(313) 965-2675

Dated: December 15, 1981

Form 2039 (Rev Nov. 1979)

APPENDIX I

Department of the Treasury
Internal Revenue Service

SUMMONS

In the matter of the tax liability of Hallison H. Young

Internal Revenue District of Detroit
Periods 1976 and 1977

The Commissioner of Internal Revenue

To Hallison H. Young
c/o Patmon, Young and Kirk, P.C.
At 3770 City National Bank Building
Detroit, Michigan 48226

You are hereby summoned and required to appear before Bonnie Burks, an officer of the Internal Revenue Service, to give testimony relating to the tax liability of the collection of the tax liability of the person identified above for the periods shown and to bring with you and produce for examination the following books, records, papers, and other data:

(The documents described in the attached rider.)

Business address and telephone number of Internal Revenue Service officer named above (313) 226-7464

Room 2286, 477 Michigan Avenue, Detroit, Michigan 48226

Place and time for appearance:

at Room 2286, 477 Michigan Avenue, Detroit, Michigan 48226

on the 17th day of November, 19 80 at 9:00 o'clock A .M.

Issued under authority of the Internal Revenue Code this 31 day of October, 19 80

Bonnie Burks
Signature of Issuing Officer

Revenue Agent
Title

Joseph W. Zimny
Signature of Approving Officer (if applicable)

Acting Group Manager
Title

Original to be kept by IRS
Form 2039 (Rev. 11-79)

All documents required to substantiate the following expenses claimed on your 1976 and 1977 federal income tax returns.

* * *

Such documents should include, but are not limited to, the following:

* * *

6) Forms 1099, W-2's, K-1's, issued to Hallison H. Young, for the years ending December 31, 1976 and December 31, 1977. Also provide other records which would show dollar value and source of interest income earned, dividends earned, salary and/or wages earned, professional fees, director fees, taxable income from partnerships, Sub-Chapter S Corporations, or income from whatever source whether paid or credited and whether in United States currency or fair market value of services.

* * *

9) Please provide copies of all records pertaining to all obligations owed to Hallison H. Young by Patmon, Young and Kirk, P.C. Such books and records should include but not be limited to all notes, contracts, or instruments of indebtness executed by Patmon, Young and Kirk, P.C. regarding all debts owed to Hallison H. Young.

APPENDIX J

Form 2039 (Rev. Nov. 1979)

Department of the Treasury
Internal Revenue Service

SUMMONS

In the matter of the tax liability of ____
Hallison H. Young

Internal Revenue District of Detroit
Periods 1976 and 1977

The Commissioner of Internal Revenue

To Hallison H. Young, in his capacity as an officer and responsible employee
of: Patmon, Young and Kirk, P.C.
At 3770 City National Bank Building
Detroit, Michigan 48226

You are hereby summoned and required to appear before Bonnie Burks, an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the person identified above for the periods shown and to bring with you and produce for examination the following books, records, papers, and other data:

(The documents described in the attached rider.)

Business address and telephone number of Internal Revenue Service officer named above: (313) 226-7464

Room 2286, 477 Michigan Avenue, Detroit,

Michigan 48226

Place and time for appearance:

at Room 2286, 477 Michigan Avenue, Detroit, Michigan 48226

on the 17th day of November, 1980
at 9:00 o'clock A.M.

Issued under authority of the Internal Revenue Code this 31 day of October 1980

Bonnie Burks
Signature of Issuing Officer

Revenue Agent
Title

Joseph W. Zimny
Signature of Approving Officer (if applicable)

Manager
Title

Original to be kept by IRS
Form 2039 (Rev. 11-79)

APPENDIX K

Form 2039 Department of the Treasury
Internal Revenue Service

(Rev. Nov. 1979)

SUMMONS

In the matter of the tax liability of
Hallison H. Young

Internal Revenue District of Detroit
Periods 1976 and 1977

The Commissioner of Internal Revenue

To Patmon, Young and Kirk, P.C.
3770 City National Bank Building
At Detroit, Michigan 48226

You are hereby summoned and required to appear before Bonnie Burks, an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the person identified above for the periods shown and to bring with you and produce for examination the following books, records, papers, and other data:

All payroll records, cancelled payroll checks, records of wages or salaries paid in cash, employees withholding certificates, W-2 Forms, and all other books, records and papers containing information relative to all wages, interest, and all other payments made to Hallison H. Young during the years 1976 and 1977.

All Employer's Quarterly Tax Returns (Form 941) for the calendar quarters ended March 31, 1976, June 30, 1976, September 30, 1976, December 31, 1976, March 31, 1977, June 30, 1977, September 30, 1977, and December 31, 1977 and all Employer's Annual Unemployment Tax Returns (Form 940) for the calendar years 1976 and 1977.

Business address and telephone number of Internal Revenue Service officer named above: (313) 226-7464

Room 2286, 477 Michigan Avenue, Detroit, Michigan 48226

Place and time for appearance:

at Room 2286, 477 Michigan Avenue, Detroit, Michigan 48226

on the 17th day of November, 19 80
at 9:00 o'clock A .M.

Issued under authority of the Internal Revenue Code this 31 day of October 1980

Bonnie Burks
Signature of Issuing Officer

Revenue Agent
Title

Joseph W. Zimny
Signature of Approving Officer (if applicable

Acting Group Manager
Title

Original to be kept by IRS
Form 2039 (Rev. 11-79)

APPENDIX L

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
U.S. POST OFFICE & COURTHOUSE BUILDING
CINCINNATI, OHIO 45202

May 25, 1983

LEONARD GREEN
CHIEF DEPUTY CLERK

TELEPHONE
(513) 684-2953
FTS 684-2953

Mr. Ulysses W. Boykin, III
Mr. Stanley Kirk
Mr. James F. Miller
Mr. Michael L. Paup
Mr. Charles E. Brookhart
Mr. Gleen L. Archer
Mr. Leonard R. Gilman

Re: United States of America, et al. vs.
Hallison H. Young, et al.
Nos. 81-1189, 81-1190, 81-1251,
81-1318, 81-1549, 81-1804, and
82-1005

United States of America, et al.vs.
Patmon, Young and Kirk
Nos. 82-1006, 82-1217

United States of America, et al. vs.
Patmon, Young and Kirk and Frederick
A. Patmon
Nos. 83-1337, 83-1338

Dear Counsel:

This letter will supplement my letter to you of May 4, 1983, in which you were instructed to file supplemental briefs in light of the Supreme Court's decision in United States vs. Rylander, 51 U.S.L.W.4367 (April 19, 1983). Those briefs are to be filed by June 6, 1983.

We have recently received notices of appeal from two more district court rulings in district court case No. 80-74872, United States of America, et al, vs. Patmon, Young and Kirk, et al. Those appeals, filed by Patmon, Young and Kirk and Frederick A. Patmon, have been docketed in this court as Nos. 83-1337 and 83-1338, respectively.

I have been asked by the court to advise you that all of these cases will be heard in Cincinnati on June 21, 1983, Specifically:

. Cases Nos. 81-1189, 81-1190, 81-

1251, 81-1318, and 81-1549, which were argued on May 28, 1983, will be reargued with the original briefs being augmented by the supplemental brief called for earlier;

Cases Nos. 82-1006 and 82-1217 will be argued on the basis of the earlier filed briefs and the supplemental brief;

Cases Nos. 83-1337 and 82-1338, and any other new appeals which might be filed from recent district court or magistrate actions in these matters, will be argued on the basis of either the supplemental brief referred to above or an additional short brief, and any appendix necessary for the court's consideration.

It is the intention of the court to have presented to it on this occasion all pending matters raised in all of the appeals stemming from this litigation. The court will entertain no motions to postpone the hearing date.

Very truly yours,
/s/
Leonard Green
Chief Deputy Clerk

LG/jj

APPENDIX M
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA and BONNIE BURKS,
Petitioners-Appellees
v. No. 81-1189
81-1318
PATMON, YOUNG AND KIRK, P.C.
Respondent-Appellant

UNITED STATES OF AMERICA and BONNIE BURKS,
Petitioners-Appellees
v. No. 81-1190
HALLISON H. YOUNG,
Respondent-Appellant

UNITED STATES OF AMERICA and BONNIE BURKS,
Petitioners-Appellees
v. No. 81-1251
HALLISON YOUNG, In His Capacity as an Officer and Responsible Employee of Patmon, Young and Kirk, P.C.
Respondent-Appellant

UNITED STATES OF AMERICA and BONNIE BURKS,
Petitioners-Appellees
v. No. 81-1549
81-1804
HALLISON YOUNG and PATMON, YOUNG AND KIRK, P.C.
Respondents-Appellants

UNITED STATES OF AMERICA and BONNIE BURKS,
Petitioners-Appellees
v. No. 82-1005
HALLISON YOUNG, et al.,
Respondents-Appellants

MOTION TO REMAND TO CORRECT OMISSION IN RECORD ON APPEAL AND TO SUPPLEMENT RECORD ON APPEAL, OR IN THE ALTERNATIVE, MOTION TO TAKE JUDICIAL NOTICE OF POST-JUDGMENT EVENTS AND DEVELOPMENTS

* * *

3. On June 23, 1982, Mr. Young and PYK obtained newly discovered evidence (part of which is submitted herewith in-camera) which affirmatively shows that the Appellees-Petitioners in these cases already had in their possession before and during contempt proceedings against Mr. Young and PYK and before the court issued the order finding them in contempt of court on August 24, 1981, copies of all of the contested bank books, records, papers or other data. (See Exhibits 2 - 11 procuded in-camera.)

4. As appears more particularly from the Exhibits attached hereto and the record on appeal (e.g., Appellees'-Petitioners' Motion for Order to Show Cause Why Respondents Should not be Held in Contempt filed June 17, 1981, the transcript of

testimony given by Appellee Burks on June 30 and July 2, 1981, transcript of proceedings before Judge Boyle on July 24, 1981, the Opinion and Order Holding Respondents in Civil Contempt of Court entered August 24, 1981, the Memorandum Opinion and Order Imposing Sanctions for Contempt entered November 30, 1981):

(a) The contested bank books, records, papers or other data were the gravamen of Appellees'-Petitioners' contempt and purge proceedings against Mr. Young and PYK.

(b) The PYK and Young contested Bank of the Commonwealth books, records, papers and other data were delivered over to the Appellees-Petitioners on June 18 and July 16, 1982 (see Exhibits 10 and 11 produced in-camera).

* * *

* * *

13. . . .The illegally disclosed, copies and released financial records, return information and confidential information comprised in excess of 11,000 copies

* * *

KIRK & ROBERTSON, P.C.
By /s/
Stanley R. Kirk (P 16007)
100 Renaissance Center,
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Detroit, Michigan 48243
(313) 259-3770
Attorneys for
Hallison Young
PATMON AND YOUNG
PROFESSIONAL CORPORATION
By /s/
Ulysses W. Boykin III
3770 City Natl Bank Bldg
Detroit, Michigan 48226
(313) 965-2675
Attorneys for Patmon,Young
and Kirk,P.C.

Dated: June 28, 1982

Office - Supreme Court, U.S.
FILED
MAR 2 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-975

In the Supreme Court of the United States

OCTOBER TERM, 1983

PATMON, YOUNG AND KIRK
PROFESSIONAL CORPORATION AND
HALLISON H. YOUNG, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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Cases:

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Grand Jury Empaneled March 19, 1980, In re, 680 F.2d 327, aff'd in part and rev'd in part *sub nom. United States* v. *Doe*, No. 82-786 (Feb. 28, 1984) 3, 4

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28 U.S.C. 1826(b) 5

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-975

PATMON, YOUNG AND KIRK
PROFESSIONAL CORPORATION AND
HALLISON H. YOUNG, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners challenge the court of appeals' affirmance of the district court's orders enforcing IRS summonses and holding petitioners in contempt for refusing to comply.

1. Petitioner Patmon, Young and Kirk is a professional corporation engaged in the practice of law. Petitioner Young, an attorney, is a principal officer of the corporation. As part of an investigation to determine Young's correct tax liabilities for 1976-1977, the IRS, under authority of Section 7602 of the Internal Revenue Code (26 U.S.C.), issued summonses to him (individually and in his capacity as a corporate officer) and to the corporation. The summonses requested production of records concerning financial transactions between Young and the firm (Pet. App. 30a-37a).

Upon petitioners' refusal to comply, the government sought enforcement of the summonses in the United States District Court for the Eastern District of Michigan (Pet. App. 10a). Following a hearing, at which the IRS agent who issued the summonses was the only witness, the district court ordered the summonses enforced, as modified by a government concession (*id.* at 10a-15a).[1] Petitioners appealed; although stays pending appeal were denied both by the district court (*id.* at 16a-18a) and by the Sixth Circuit, petitioners persisted in refusing to comply with the enforcement orders. The government accordingly moved to have them held in contempt. The district court granted that motion, noting Young's "conflicting statements" on the stand (*id.* at 21a) and finding that petitioners had not shown adequate cause for failing to comply with the production order (*id.* at 19a-24a). The corporation was fined $500 per day until it purged itself of its contempt; fines totalling $8,000 have been levied against it to date (Pet. 20; Pet. App. 23a). Young was ordered incarcerated until he produced the records required by the summons directed to him in his capacity as corporate officer, and that order was stayed pending appeal (Pet. App. 21a-22a, 26a). The district court determined that Young had purged himself of his contempt with respect to the records required by the summons directed to him in his individual capacity (Pet. 19).

Petitioners filed eight separate appeals from the district court's orders enforcing the summonses, holding them in contempt, and imposing sanctions. Consolidating those

---

[1]The government acknowledged a clerical error in the summons directed to Young in his capacity as a corporate officer, withdrawing all but two paragraphs of that summons and thus requesting production only of corporate business records "which may properly be compelled over a [F]ifth [A]mendment claim even if they incriminate the custodian." Pet. App. 12a (citing *Fisher* v. *United States*, 425 U.S. 391, 411-412 (1976)).

appeals with four others filed by the corporation and its principals, the Sixth Circuit, in an unpublished order, affirmed the district court in all respects relevant here (Pet. App. 1a-4a).[2]

2. Petitioner Young contends (Pet. 27-38) that the order directing him to produce corporate business records violates his Fifth Amendment privilege against self-incrimination, asserting that the decision below conflicts with *In re Grand Jury Empaneled March 19, 1980*, 680 F.2d 327 (3d Cir. 1982), aff'd in part and rev'd in part *sub nom. United States* v. *Doe*, No. 82-786 (Feb. 28, 1984). In *Doe*, this Court considered the extent to which the Fifth Amendment privilege may be invoked by a sole proprietor in response to an IRS summons seeking production of the proprietorship's business records.

Petitioner's contention is frivolous. Young was served with two summonses. One sought production of personal and corporate business records and was addressed to him in his individual capacity (Pet. App. 30a-32a). The district court eventually ruled that Young had complied with that summons, thus purging himself of his contempt, and the court of appeals directed that the order enforcing that summons be dismissed. See page 2 & note 2, *supra*. There

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[2]The court of appeals directed dismissal of the order enforcing the summons issued to Young in his individual capacity (6th Cir. No. 81-1190) in view of the district court's finding that Young had complied with that production order. See Pet. App. 3a; page 2, *supra*. The court of appeals retained jurisdiction of another appeal (6th Cir. No. 82-1827) because the record was incomplete (Pet. App. 4a). The court of appeals dismissed the remaining two appeals (6th Cir. Nos. 83-1337 and 83-1338), which challenged certain discovery orders of the district court, for lack of jurisdiction (Pet. App. 4a). The corporation and Frederick Patmon, one of its principals, have filed a separate petition for a writ of certiorari seeking review of the decision below in the latter respect. *Patmon, Young and Kirk Professional Corp. and Frederick Patmon* v. *United States*, No. 83-824.

is thus no longer a live controversy concerning Young's Fifth Amendment privilege to withhold personal business records, whether on "act of production" grounds (see Pet. 31-32, 36-37) or on any other ground. Compare *United States* v. *Doe*, slip op. 7-8.

The other summons sought production of the corporation's business records and was addressed to Young in his representative capacity, *i.e.*, in his capacity as a responsible corporate officer (Pet. App. 33a-34a). As the district court properly held (*id.* at 11a-12a), it is horn book Fifth Amendment law that "an individual cannot rely upon the privilege [against self-incrimination] to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally." *Bellis* v. *United States*, 417 U.S. 85, 88 (1974) (cited in *United States* v. *Doe*, slip op. 3). Contrary to Young's repeated assertions (Pet. i, 28, 31, 34, 36), the summons in question was not issued to him as a "sole proprietor" and did not require production of "sole proprietorship" records; that aspect of *Doe* has no application here.

3. Petitioners contend (Pet. 39-44) that the government's petition to enforce the summonses was based on perjured affidavits and illegally obtained evidence. These allegations were not made in the district court and were presented for the first time to the court of appeals in a motion for remand to the trial judge, a motion that was filed after the court of appeals had heard oral argument (Pet. App. 42a-44a). Petitioners do not contend that the Sixth Circuit abused its discretion in declining to remand for consideration of these belated factual allegations, and, even if petitioners did so contend, it would not be a contention deserving this Court's review.[3]

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[3]There is no merit to petitioners' assertion (Pet. 41-42) that the decision below conflicts with *United States* v. *Beacon Federal Savings & Loan*, 718 F.2d 49 (2d Cir. 1983). That case held that, where evidence

4. Petitioner Young contends (Pet. 45-51) that he was deprived of due process because the Sixth Circuit failed to decide his appeal from the contempt order within 30 days after his notice of appeal was filed. Young predicates this contention on 28 U.S.C. 1826, the "recalcitrant witness" statute. Section 1826(a) provides that, "[w]henever a witness in any proceeding before or ancillary to any court or grand jury" refuses to testify or produce records on court order, he may be summarily held in contempt and incarcerated for the life of the court proceeding or the term of the grand jury. Section 1826(b) provides that appeals from orders of confinement entered under Section 1826(a) "shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal."

Although Young's notice of appeal asserted (Pet. App. 28a) that he was appealing under 28 U.S.C. 1826, that Section plainly has no application to this summons enforcement proceeding, and its 30-day time limit is thus irrelevant. Young was held in contempt for refusing to obey an order enforcing an IRS summons, not for refusing to testify as a "witness" in any court or grand jury proceeding.[4] Orders enforcing summonses are final, appealable orders. *Reisman*

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has concededly been seized in violation of the Fourth Amendment, a district court in a summons enforcement proceeding must consider whether the summons was based on the illegally-seized evidence, and, if so, whether it would be an abuse of the court's process to enforce the summons. In this case, by contrast, there has been no finding that any evidence was seized improperly, merely petitioners' unsubstantiated and belatedly-raised assertions to that effect.

[4]The purpose of Section 1826 is to permit speedy resolution of contempt orders emanating from ongoing trials or grand jury proceedings, so that a witness's recalcitrance will not unduly delay their completion. An order holding a summonsed party in contempt, by contrast, ends the entire proceeding, and there is thus no ongoing proceeding to be delayed pending appeal.

v. *Caplin*, 375 U.S. 440 (1964). A contempt citation consequent upon a summonsed party's refusal to comply is entered under the court's inherent power to enforce its orders (*Shillitani* v. *United States*, 384 U.S. 364 (1966)), not under 28 U.S.C. 1826.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

MARCH 1984

DOJ-1984-03